

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS GALLAGHER	:	DETERMINATION
	:	DTA NO. 819115
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Year 2001.	:	

Petitioner, Thomas Gallagher, 20 Sandhurst Road, Lakewood, New Jersey 08701, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the year 2001.

The Division of Taxation ("Division"), by its representative, Barbara G. Billet, Esq. (Justine Clarke Caplan, Esq., of counsel), filed a motion dated December 20, 2002 for an order dismissing the petition or granting summary determination and denying the petition. Petitioner did not file any reply papers which were due by January 21, 2003, and such date began the 90-day period for the issuance of this determination. Based upon the motion papers, the affirmation and documents filed therewith, and the pleadings in this matter, Frank W. Barrie, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner, the lessee of a new 2000 Lexus automobile, was entitled to a refund of a prorated portion of the sales tax that he paid to New York on the total amount of lease payments due under a car lease of 39 months as a result of his change of residence from New

York to New Jersey and the registration of his leased car in New Jersey only 9 months into the lease term of 39 months.

FINDINGS OF FACT

1. On August 21, 2000, petitioner, then a resident of Nanuet (Rockland County), New York, leased a 2000 Lexus from the New Jersey new car dealer, Lexus of Englewood. New York sales tax at the rate of 7.25% was paid in the amount of \$1,399.71¹ on the total amount of lease payments due under the lease of \$19,305.00 (39 months multiplied by the monthly lease payment of \$495.00).

2. After living in New York State for 66 years, during January 2001, petitioner purchased a home in New Jersey, and on May 29, 2001, presumably after actually moving to New Jersey, registered his leased Lexus automobile in his new home state. On registering his vehicle in New Jersey, he was required to pay New Jersey sales tax of \$612.80 for the 30 months remaining on the lease.

3. Petitioner filed a claim dated May 30, 2001 for refund of sales tax in the amount of \$1,071.00. This amount was computed using the sales tax of \$35.85 per month, based on the monthly payment of \$495.00 and a sales tax rate of 7.25%, multiplied by the 30 months remaining on the 39-month lease after petitioner's registration of the vehicle in New Jersey and his move to this neighboring state.

4. The Division denied petitioner's refund claim by letter dated July 16, 2001 for the following reason:

When a lease, an option to renew or similar provision, or a combination of these, is entered into on or after June 1, 1990, the amount due under the agreement and

¹ Sales tax at the rate of 7.25% on total lease payments of \$19,305.00 computes to \$1,399.61.

for the entire period covered (including renewals and/or options) will be immediately subject to sales tax.

There is no provision in the New York State Sales and Use Tax Law to allow for refund of sales tax paid on the lease of a vehicle where the lessee relocates to another state where they [sic] may also be required to pay tax.

CONCLUSIONS OF LAW

A. A motion for summary of determination may be granted,

if, upon all the papers and proof submitted, the administrative law judge finds it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Here, petitioner did not respond to the Division's motion, and he is therefore deemed to have conceded that no question of fact exists which would require a hearing to resolve (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, *appeal dismissed* 62 NY2d 942).

B. Pursuant to Tax Law § 1105(a), sales tax is imposed on "[t]he receipts from every retail *sale* of tangible personal property, except as otherwise provided in this article" (emphasis added).

C. The terminology "sale, selling or purchase" is defined expansively in Tax Law § 1101(b)(5) to mean any transaction in which there is a transfer of title or possession or both of tangible personal property for a consideration including the "exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever."

D. Prior to June 1, 1990, monthly car lease payments were subject to the imposition of sales tax as they were made. However, effective June 1, 1990, pursuant to Tax Law § 1111(i)(A) (as added by L 1990, ch 190), all payments under a car lease for a term of one year or more,

were “deemed to have been paid or given and shall be subject to tax, and any such tax shall be collected, as of the date of first payment under such lease.”

E. Pursuant to the Division’s tax regulations at 20 NYCRR 527.15(e), no refund or credit shall be allowed based upon the fact that receipts are not actually paid as in the case of early termination of a lease, failure to exercise an option to renew a lease or bad debt. Petitioner contends that this limitation on refund or credit subjects him “to the un-American position of having to pay twice on the same item” since he “had to pay tax on the remaining term of the lease-30 months” to New Jersey. He notes that when he turned in his New York license plates, he received a refund from the New York State Department of Motor Vehicles for the unused portion of his New York registration.

F. The Division’s regulatory limitation on refund and credit in similar circumstances to the matter at hand has been upheld by the Tax Appeals Tribunal in three recent cases: (i) ***Matter of Moerdler*** (April 26, 2001, ***confirmed*** 298 AD2d 778, 750 NYS2d 329 [wherein no refund or credit was allowed the taxpayer whose automobile was stolen only four months into the lease period]), (ii) ***Matter of Torquato*** (October 12, 2000 [wherein no refund or credit was allowed the taxpayer who moved to California and registered her automobile in that state ten months into the lease period, facts and circumstances mirroring the ones herein]); and ***Matter of Miehle*** (August 24, 2000 [where no refund or credit was allowed the taxpayer whose automobile was badly damaged in a car accident resulting in the termination of the lease only one month into the lease period]). In these decisions, the Tax Appeals Tribunal noted, in particular, that pursuant to Tax Law § 1139, a refund or credit is allowable for any sales and use tax which was erroneously, illegally or unconstitutionally collected or paid. In the circumstances at hand, where the lessor collected and the taxpayer paid the proper amount of sales tax in the manner prescribed by Tax

Law § 1111(i), the Tribunal concluded that such accelerated payment of sales tax on future payments under a car lease was not erroneously, illegally or unconstitutionally collected or paid. Consequently, based upon these recent precedents, it is concluded that the Division's denial of petitioner's refund claim was proper.

G. The petition of Thomas Gallagher is denied, and the refund denial dated July 16, 2001 is sustained.

DATED: Troy, New York
March 20, 2003

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE